IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER HEREIN IN SUPPORT OF PETITIONER'S PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

Notwithstanding Respondents' statement of the case in their answer to the petition for certiorari herein, we refer the court to the more detailed statement of the case as set out in the petition for certiorari at pages 2-15, and in the supporting brief at pages 2-13. Specifically, with respect to the Garrison affidavit and what Respondents consider to be a "disclaimer" by Mr. Vinson (Respondents' Br., pp. 5, 10-11), we ask the court to consider what was said with respect to those matters in the petition for certiorari commencing at pages 10-11 and at page 35, and in the supporting brief under Point III commencing on page 43 thereof.

The question raised by the Garrison affidavit and the Vinson letter are included among the questions presented by the petition for certiorari. (pp. 16-17.)

Respondents assert the so-called "advisory" character of the Board's order as held by the court below as if that holding were a final and complete determination of the controversy. Although such is not the case, as appears we believe from the petition for certiorari herein and the brief in support thereof, we are met once again by the all-important question as to just what the Government's real contentions are with respect to the character and enforcibility of Board orders. Respondents in their brief in no way deal with the questions involved from the standpoint of the claim that Board orders are enforcible by administrative action.

In its brief herein Respondents assert that Petitioner is not entitled to equitable relief for the reason that the Board itself has, and had, no power to compel compliance either by legal proceedings or the imposition of sanctions, and that therefore "the order in no way altered the legal rights of the parties." (Respondents' Br., p. 7.) However, it does not at all follow from the fact that the Board itself has no powers of enforcement either through legal proceedings or by the imposition of sanctions that the order itself does not alter the legal rights of the parties. If the order is what the Board has consistently claimed it to be, namely "compulsory arbitration," then it does fix or alter the legal rights of the parties. By the terms of the order, mandatory in form, the Board required certain specific provisions—for maintenance of membership and check-off—to be included in Petitioner's contract with its employees, and the Board further directed a retroactive wage increase. The order in these respects certainly did fix or alter the legal rights of the parties, and the mere fact that Petitioner chose to comply with that part of the order

directing the retroactive wage increase does not in any way change the character or mandatory effect of the order.

Likewise in its petition for certiorari which has now been filed in this court in the *Ward* case the Government characterizes the decisions of the court below in the first *Ward* case and in the *Motor Carriers* case as merely that "The Board has no power to enforce its orders." (Petition, p. 20.) It is a mere quibble to argue that the *Board* has no powers of enforcement. That is not the question. Are or are not the Board's orders enforcible by any means, administrative or otherwise? To leave Petitioner without even the protection of a declaratory judgment declaring the unenforcibility of the Board's order is to give the Government a free hand to enforce the Board's order here involved against Petitioner in any manner or by any means deemed desirable by the Government.

In Petitioner's supporting brief (p. 25, *et seq.*) we called the court's attention to the fact that in the *Motor Carriers* case the court below stressed the absence of any threatened, or asserted right to maintain, administrative proceedings upon the authority of the Board's order, and in the *Ward* case stressed the absence of any specific showing of threats of enforcement, whereas in the instant case specific threats of enforcement were made by the Board and are included in the record of this case before the Board, and it is now clear that the Board and the executive branch of the Government assert, and insist upon, the enforcibility of the Board orders by administrative proceedings. As stated in our petition for certiorari (p. 16), "What is the essential nature of the Board's orders? Can they be merely 'advisory' and at the same time enforcible by executive action? Or, if the order here is enforcible in any way or by any means, was not Petitioner entitled to a judicial determination by the District Court as to whether the order violated its constitutional right, or required it to

enter into a contract specifically in violation of the National Labor Relations Act? Is not the order under such circumstances reviewable?" In the old *Pennsylvania Railroad* cases[1] the orders were specifically held to be incapable of enforcement excepting through the persuasive effect of public opinion. And although such is said [presumably] to be the character of the order involved in the instant case [and of Board orders generally] by the court below in the *Motor Carriers* case, the *Ward* case, and in the instant case, and is clearly said by Judge Coleman in *Baltimore Transit Co.* v. *Flynn*, U. S. D. C. D. Md., 50 Fed. Supp. 382, the fact remains, as appears beyond any question of doubt, that such is not the character of the Board orders in the eyes of Respondents or of the executive branch of the Government at large.

In our petition for certiorari we called the court's attention to Executive Order 9370 directing Mr. Vinson, as Director of Economic Stabilization, to impose sanctions for non-compliance with an order of the Board, and we called the court's attention to the allegations in the complaint that Mr. Vinson had imposed, or was about to impose, such sanctions. To meet that phase of the case, Respondents produced the Garrison affidavit, which, as pointed out in the petition for certiorari and brief, was wholly inadequate to show the inapplicability of that order to Petitioner.

Since the filing of our petition for certiorari, and on February 14th last, Mr. Vinson has directed the imposition of sanctions against the E. A. Laboratories, Inc. (referred to in footnote 3 in Respondents' brief commencing at the bottom of page 10 thereof) because of the failure of that company to comply with an order of the Board. And sanctions were imposed for the avowed purpose of bringing about compliance with the Board's order. And that there may be no question as to the Government's

1. 261 U. S. 72; 267 U. S. 203.

view that Board orders are enforcible by executive action, as is clearly shown by Mr. Vinson's said directive, we include in the appendix hereto a copy of the release with respect to such directives. The directives of Mr. Vinson in the *E. A.* case leave no uncertainty of his position or of the position of the Government, that Board orders are in fact and law enforcible, and that the Government proposes to enforce them—if not by plant seizure under the supposed authority of the War Labor Disputes Act, or independently thereof, under the President's asserted constitutional powers.[1]

1. Reference by Mr. Vinson to the asserted principle that no one has a legal right to a government contract and that no employer who "defies" the Government's machinery for the settlement of disputes can claim such a legal right is a mere smoke screen to conceal the Government's essential position that Board orders are compulsory and enforcible. In *L. P. Steuart & Bro.* v. *Bowles*, 322 U. S. 398, this court sustained the right of OPA to suspend a fuel oil dealer for violating a ration order. But there not only was the suspension referable to the ration order itself, but the ration order itself was binding upon the dealer. For present purposes it may be conceded that if an executive regulation is in and of itself binding then the administrative agency in question may provide reasonable rules and regulations for enforcement. But even so, nothing in the *Steuart* decision supports the asserted right of the executive branch of the government to not only institute a system of "compulsory arbitration," but to enforce compliance with "compulsory arbitration awards" by executive action while at the same time denying to the citizen any right or recourse to the courts. If it be assumed that Executive Order No. 9370 applies only to orders of the Board issued pursuant to the War Labor Disputes Act, then we would have a case where the executive branch imposes a penalty for noncompliance with the Board's order in the absence of any legislative sanction therefor. In the *Steuart* case this court said:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and administrative functions to make additions to those which Congress has placed behind a statute."

It might as well be claimed that if the Board saw fit to direct an employer to grant a three hundred per cent wage increase to his employees the President could thereupon seize the plant to compel compliance by the employer with the Board's order, or to cause sanctions to be imposed pursuant to Executive Order No. 9370

In the Government's opening brief filed before Judge Sullivan in Chicago in the *Ward* case it is insisted that Board orders were compulsory upon the employer and were to be enforced by Executive action. This was clearly the import of the affidavits of Judge Byrnes, Mr. Vinson, and Mr. Davis, Chairman of the Board. Specifically the

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because of such noncompliance. If compulsory arbitration is to be had either in peace or war time it is for the Congress, in the exercise of the legislative function, so to provide. And it would then be for Congress to provide means of enforcement and to provide penalties for noncompliance with the arbitration award. And certainly whether Congress did or did not so provide our constitutional form of government would not permit the enforcement of such award against the citizen without affording to the citizen his day in court.

Also, in passing, the further statement at the conclusion of the release that a "better method" [in addition to executive action for enforcement of Board orders] would be a Congressional act providing penalties enforcible by the judiciary for noncompliance with Board orders [advocated by Judge Byrnes a few days before] is tragic humor if we bear in mind that the Board itself successfully opposed including in the War Labor Disputes Act any provision for judicial enforcement. See Mr. Davis' statement to the Select Committee of the House investigating the Ward seizure (Report, pp. 36-39; and Mr. Biddle's statement (Rep. p. 142); see also the Majority Report of the opinion, pp. 12-13, 16.)

In the same connection a majority of the Committee made this statement:

> "Undoubtedly in the consideration of this legislation Congress had in mind the cooperation given the work by the Board by both industry and labor, despite the displeasure of each with some of its decisions, and that enforcement of its orders by any means whatever had been necessary in strikingly few instances, in each of which the Chief Executive had upon review made the war labor policy effective by Executive order and seizure. Our conclusion under these circumstances is that having eliminated the only alternative by painstakingly striking from the act all language that might be construed as authorizing enforcement through the courts, Congress intended that the orders of the Board should continue to be enforced when necessary in exactly the same manner as before. This method, already well established by usage, is neither prohibited nor limited and no other is suggested by the act."

See also what is said *infra* with respect to the Government's brief before Judge Sullivan in the *Ward* case.

brief quoted from the majority report of the Select Committee of the House, to the proceedings before which Committee we referred in our petition herein, and adopted the majority opinion as expressed in the Committee report as follows (p. 22):

> "Enforcement was considered and all language that might have been construed to authorize enforcement *through the courts* was with care stricken from the Act. But *no word of limitation* upon the use of Executive power was inserted, and no other means of enforcement was provided. Unless this legislation is to be held senseless and useless the inevitable conclusion is *that Congress contemplated and intended the orders of the Board to be enforced after passage of the Act in the same manner and by the exercise of the same authority as had repeatedly been done before the Act was passed.*" (Italics ours.)

The brief then attempted to reconcile the Committee holding with the decisions of the court below in the *Motor Carriers* case and the *Ward* case, and stated that the—

> "courts that have held that the orders of the Board cannot be enforced or reviewed in the courts have nevertheless recognized that as a result of a failure to settle a labor dispute on the basis of the Board's orders it may be necessary for the President to take possession of the plants and facilities involved in a labor dispute."[1]

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1. The Government's reply brief before Judge Sullivan in the *Ward* case contains, on page 27 thereof, this heading:

> "A. The Executive Order is not an attempt to enforce the orders of the War Labor Board, and a judgment for the plaintiff in this case will not require Ward to comply with those orders."

Under this heading we then find the following statements:

> "Neither the Executive Order nor this litigation is an attempt to enforce the orders of the War Labor Board against Ward as defendants contend. The Executive Order was issued because disputes between Ward and its employees that had lasted for two and a half years culminated in December, 1944 in a strike in the Ward plants in Detroit. * * *
>
> "The failure to comply with the order of the War Labor

Under the circumstances, and in view of the impelling necessity of a correct understanding as to the question of the enforcibility of Board orders—so far as that understanding can be had—we are constrained to call the court's attention to certain additional statements made by Mr. Biddle before the House Committee. These statements are in addition to those set forth in our petition for certiorari at pages 11-12; 25-28.[1]

The Committee report shows the following testimony:

"Mr. Biddle: * * * Let me put it this way: Practically speaking, the President enforces the order of the War Labor Board. * * *

"Mr. Clark: I meant a little more than that. I am raising the question as to whether Congress could possibly have intended to set up this Board with this great personnel, great consumption of time, and handle, as I understand, 6,700 cases, without having

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Board was one of the causes that led to these labor disputes. * * *

"*The fact is that neither the Executive Order nor a judgment for the plaintiff in this suit will compel Ward to obey the orders of the War Labor Board. Ward will not have to make a contract with the union. Ward will not have to accept maintenance of membership or arbitration or the other provisions contained in the Board's order. Ward will not have to pay the wages specified in the orders.* * * *This is a very different situation from the one that would exist if Ward could be compelled to obey or to comply with the orders of the War Labor Board. Ward could then be required to make the contract in its own name to perform under the contract, to pay the wages called for by the contract, and for doing these things it would receive no fair compensation from the Government.*" (Italics ours.)

It is difficult to reconcile the above statements with what Mr. Biddle testified to before the House Committee, which statements would seem to be a declaration that Board orders are unenforcible and need not as a matter of law be complied with by the employer.

1. The testimony there given and the report itself may properly be considered. Cf. *Muschany* v. *United States; Andrews, et al.*, v. *United States*, Nos. 31-32 this term, decided February 5, 1945. The Government's petition for certiorari in the *Ward* case refers to the same matters. (p. 25.)

intended that in some way or by some right this ultimate order should be enforceable.

"Mr. Biddle: I agree with you. It could not have intended that.

"Mr. Clark: Now, if it is conceivable that Congress deliberately took the enforcement of these orders out of the hands of the courts, then what other possible way is there for their enforcement, other than the Chief Executive?

"Mr. Biddle: There is none. Now, let me add, Mr. Clark, that although the War Labor Board's orders cannot be reviewed by the court, as I said, repeatedly, the seizure by the President can always be reviewed by the court.

"Mr. Clark: Now, getting right down to that, this proposition that if it is true that the courts cannot enforce these orders—I think that was clearly indicated—you cannot go into court on one of these orders, the employer, the employee, or the President, it cannot be litigated, if that is true then they cannot be enforced, unless they are enforced by the President.

"Mr. Biddle: Yes.

"Mr. Clark: And if enforced by the President, how could he proceed otherwise than he did proceed in this case? Is there any other way he could proceed than by seizure?

"Mr. Biddle: There is no other way. Moreover the statute says 'shall immediately seize.' (Report, p. 143.)

And further (Report, p. 144):

"Mr. Clark. Now, of course, when the Labor Board took up this case it entered an order on the 18th of January 1944, in which, as you have already suggested, it provided for maintaining the status quo, it provided for elections in 30 days, and so forth, which, as the record shows, Montgomery Ward declined to comply with. Now, if it be conceded that it thereupon became the duty of the Chief Executive to do something about it, you would say he had on recourse to the courts and he could not do anything but go out and seize the property."

"Mr. Biddle: No; I do not say that. I would like to have my statements recorded as accurately as possible.

"Mr. Clark: I did not intend to put anything in your mouth, Mr. Biddle.

"Mr. Biddle: I said his duty under the statute was to seize the property. That is what he was told to do by the statute. Now, the question was whether or not a court of equity would have given the Government adequate relief to get possession of the property. I said there were two things involved. First, I said it was his duty, under the whole structure of the act, not to go into the court but to seize the property; and, secondly, I said that until there was a real interference a court of equity would hardly see any reason to help the Government, with all its power to take and its direction under the statute to take. The court would say, 'Well, why don't you go in and take it? Why do you need us?'

"Mr. Clark: The point I was discussing here, I was laying the provisions of section 3 aside and I was referring to section 7, in which there is no direction to seize.

"Mr. Biddle: Under section 7 the Government could not have asked a court of equity to do anything. That is clear.

"Mr. Clark: Now, then, that order, or any order of the Board that is contested, there is no governmental agency or power to enforce it other than the power you possess through the President.

"Mr. Biddle: That is right.

"Mr. Clark: And he, under the provisions of section 7, could not go into court to effect that enforcement?

"Mr. Biddle: No.

"Mr. Clark: The only thing he could do was to take physical possession of the property.

"Mr. Biddle: That is right."

And further (Report, pp. 150-151):

"Mr. Dewey [reading]: * * *

"Now my question is: Are you the policeman? Are you the cop?

"Mr. Biddle: No, I am not a cop; I am just a lawyer.

"Mr. Dewey: But apparently there is the search for a cop. If a cop is not in the Attorney General's office, then where do you think he might be? Who is the cop?

"Mr. Biddle: That depends on the particular case.

"You mean who enforces these seizures?

"Mr. Dewey: I am very much in the dark in this regard myself, but Mr. Davis claims to have no authority and wants a cop. Who is the cop?

"Mr. Biddle: Well it is very clear to me who enforces them. If by the word 'cop' you mean what person has the Congress chosen to enforce these orders, it is the President, as you have said. So it is clear to me that the President is the man who enforces the orders."

And further:

"Mr. Biddle: I think there was every evidence that that might occur because, as I have said, it is the risk. You cannot guarantee the result, but as a matter of judgment when you see this thing spreading which goes to the roots of the no-strike, no-lockout agreement, it goes to the very roots of that, and if you say to labor throughout the country 'we will not enforce the decision of the arbitration machinery that both sides agree on' the risk is very great.

"Mr. Elston: Then you seized the plant in order to avoid this disaster?

"Mr. Biddle: Yes." (Report, p. 155.)

And further:

"Mr. Elston: What else did you accomplish?

"Mr. Biddle: We accomplished the thing that was basic in the whole situation, that the Government would enforce this agreement for no-strike and no-lockout. That is the essence of this thing." (Report, p. 156.)

And further:

> "Mr. Biddle: * * * We do not go into possession just for fun, we go in to enforce the order." (Report, p. 156.)

And further:

> "Mr. Elston: Then what is the purpose of the company and the labor organization entering into any agreement if the War Labor Board has that power to make any kind of an agreement that they want?
>
> "Mr. Biddle: They did not make the agreement. The only time when the War Labor Board enters into it is when there is a dispute. The question is, Mr. Elston, do you want a peaceable arbitration or don't you? The War Labor Board is given the power to arbitrate during the war. That is what it amounts to. It is given the arbitration procedure specifically under the Act. If you do not think there should be peaceable arbitration then don't put it in the Act." (Report, p. 160.)

Mr. Biddle advised the legality of Executive Order 9370. (Report, p. 163.) He therefore approved the position of the President when the latter said in his letter to Mr. Davis with reference to the War Labor Disputes Act that—

> "Congress intentionally left the enforcement of these [Board] orders to executive action." (J. A. 30.)

And further when the President said in the same letter,

> "When an employer refuses to comply his plant may be seized and operated by the Government in accordance with the terms and conditions of employment prescribed by the Board,"

and that—

> "Less drastic sanctions, however, including control of war contracts of essential materials and of transportation and fuel should be applied if this can be done without impeding the war effort,"

and that—

> "I am accordingly requesting the Director of Eco-

> nomic Stabilization to direct the application of any or all available sanctions of this sort by the appropriate agencies of government in cases of noncompliance reported to him by the Board." (J. A. 30.)

That Mr. Vinson is of the same mind clearly appears from his action in the E. A. Laboratories matter. In his letters to the Army and Navy he specifically stated (Appendix, p. 23):

> "Therefore, pursuant to Executive Order 9370 I hereby direct the Navy Department-War Department, unless the National War Labor Board shall report to it on or before February 10, 1945 that this employer is in compliance with the Board's directive order, to cancel, or cause to be cancelled, all contracts of this employer as rapidly as possible."

And in his letter to the War Production Board Mr. Vinson said:

> "Therefore, pursuant to Executive Order No. 9370, I hereby direct the War Production Board, unless the National War Labor Board shall report to it on or before February 10, 1945, that this employer is in compliance with the Board's directive order, to deny this employer all applications for priority assistance or for the allocation of materials which are in short supply, and to cancel all outstanding priorities and allocations."

And in the same release Mr. Vinson said (Appendix, p. 24):

> "In Executive Order No. 9370 the President has determined that the allocation of critical materials or facilities to those who refuse to abide by the legally authorized determinations of the National War Labor Board is not necessary or appropriate in the public interest and to promote the national defense."

In view of this specific act on the part of Mr. Vinson pursuant to Executive Order No. 9370 we urge again the necessity of a determination by this court as to whether

or not that executive order applies merely to orders of the Board entered after the enactment of the War Labor Disputes Act, or whether it applies to all orders of the Board, and of determining whether or not the Garrison affidavit or the Vinson letter, or both together, present any substantial ground for denying protective relief to Petitioner from the now plainly threatened action of Mr. Vinson against Petitioner because of Petitioner's refusal to abide by the Board's order.

In view of Mr. Vinson's action in the *E. A. Laboratories* case,[1] what becomes of the statement of the court below in

[1] The chronology in the *E. A. Laboratories* case is as follows:

The Board's order was entered under date of November 9, 1944. (Release B-1830.) Apparently a dissenting opinion of the industry members was filed at the same time. (Release B-1830A.)

The majority thereupon filed a majority opinion on January 23, 1945. (Release B-1830A.) However, the majority opinion itself is dated January 20, 1945.

Under date of January 31, 1945 Mr. Vinson sent his letters to the War and Navy Departments and to WPB. (Appendix, p. ....)

As stated, the letters directed action unless compliance by the company was reported on or before February 10, 1945. (Appendix, p. 23.)

Public notice of Mr. Vinson's action was not given until February 15, 1945. (Appendix, p. 21.)

It does not appear whether the company itself was ever given notice of the proposed imposition of sanctions.

In the first *Ward* case (No. 537, this term) it appears from the record therein (p. 86) that Mr. Vinson stated in his affidavit that he had neither threatened to take action, nor had taken action, to effectuate compliance with the Board's order, and that he was "not presently advised" as to what action, if any, he would take pursuant to his discretion under Executive Order 9370 "should the matter ever be reported to me." In the same case it appeared (Record, p. 87) that Mr. Garrison's affidavit stated that the Board had neither threatened to take action nor taken action to enforce its Directive Order, and that it "has not referred" the matter of the company's noncompliance with the Directive Order either to the President or to the Director of Economic Stabilization.

The release in the *E. A. Laboratories* matter stated that the Board had reported to Mr. Vinson the company's refusal to comply with the Board's order. (Appendix, p. 21.) It does not appear when the Board so reported, or whether the company had been given prior notice of the Board's intention to report the matter to Mr. Vinson.

the instant case that the alleged action taken, or about to be taken, by the Director is a mere "prediction" without legal effect? (J. A. 99.) As was pointed out in our supporting brief, (p. 32) the "threat" may be implicit in the statute or order itself. Here the threat by the Director of Economic Stabilization is implicit in Executive Order No. 9370. If the court below is right, then there could be no preventive relief until the threatened action becomes an accomplished fact. But in that event if there could be no injunctional or preventive relief until after the Director of Economic Stabilization has acted, then when he does act we would undoubtedly be met by the objection which has already been met in the instant case with reference to the Board, namely, that having reported the matter to the President there was nothing further for it to do, and therefore preventive relief cannot be had. (See Respondents' Brief herein, p. 10). In other words, Respondents claim that injunctional or preventive relief cannot be had prior to action actually taken by the Director of Economic Stabilization, but that when he has once acted then it is too late for any such remedy, and therefore a plaintiff's complaint is to be dismissed. In our supporting brief we quoted Mr. Justice Vandeventer's statement in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, that "one does not have to await the consummation of threatened injury to obtain preventive relief." If any statement is in point in the instant case Mr. Justice Vandeventer's statement is in point.

We thought the courts were created for the protection of the rights of litigants—not to be made the means of carrying out unlawful action on the part of administrative officials.

Petitioner has laid the foregoing before this court for the reason that notwithstanding the views expressed by the court below as to the nature of the Board orders, the real

contentions of the parties to this suit will shape the relief to which Petitioner is entitled. If the Board's order is compulsory upon Petitioner as amounting to "compulsory arbitration" and is enforcible against it through administrative or executive action, then Petitioner is entitled as a matter of right to a decree in the pending suit determining its rights with respect to the order, and specifically a judicial determination of the validity of "compulsory arbitration" instituted by the executive branch of the Government without any legislative sanction, of the further question whether the requirement for maintenance of membership and checkoff violate the provisions of the National Labor Relations Act and of any other relevant questions that may be involved. On the other hand, if the order is "advisory" only, in the sense that it is not compulsory upon Petitioner, and is not enforcible against it by administrative or other action, then Petitioner is entitled to a judgment so declaring, even though in such event the constitutional questions, and the question as to any violation of the National Labor Relations Act, raised by the requirement for maintenance of membership and check-off may become academic.

Respondents say (Brief, p. 12) that there is here presented no substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. As pointed out in our petition for certiorari, however, and supporting brief, is it conceivable that in the case of the old *Railroad Labor Board* orders passed upon by this court, this court would have held—had the Declaratory Judgment Act been in effect at the time—that there was no substantial controversy then existing between adverse parties having sufficient immediacy and reality to warrant the issuance of a declaratory judgment? The question, we submit, furnishes its own answer.

Respondents seem to suggest in their conclusion to their brief that because the order here involved was issued by the Board prior to the War Labor Disputes Act the legal questions raised by the entry of the order, its asserted compulsory and binding effect upon Petitioner, and its threatened enforcement, are of little, if any, practical significance. Even there, however, it is essential to that position that Executive Order No. 9370 be inapplicable to the instant order. And as to that Respondents' case stands entirely upon the inadequate affidavit of Mr. Garrison and the Vinson letter.

The action taken by Mr. Vinson in the *E. A. Laboratories* case places a wholly different color upon the instant case than it had when considered and decided by the court below. We must keep in mind that the Board itself has consistently claimed that its orders were enforcible wholly without reference to the War Labor Disputes Act, that it has always professed that it would exert every effort possible to bring about compliance, that Executive Order 9370 is not specifically limited to orders entered pursuant to the War Labor Disputes Act, that the executive branch of the Government and particularly the Department of Justice, insist that the President's constitutional powers, wholly apart from the War Labor Disputes Act, fully authorize not only Board orders but also their enforcement, and that the clear import of the Government's petition for certiorari in the current *Ward* case (No. 949, this term) is that the War Labor Disputes Act is merely supplementary to and confirmatory of the President's powers otherwise existing. (p. 16.)

In the *Motor Carriers* case the court below said, with reference to Executive Order No. 9370, that the Board had not reported or threatened to report appellants' failure to comply with its order. (143 F. (2d) p. 145.) And it was accordingly said that that order was irrelevant. Neverthe-

less it added by way of dictum that Executive Order 9370 applied only to Board orders issued under War Labor Disputes Act. At the time the *Motor Carriers*, the *Ward*, and the instant cases were decided by the court below there had been no public announcement of any action by Mr. Vinson pursuant to Executive Order 9370. Had the action taken in the *E. A. Laboratories* case been an established fact at the time the three cases were decided, we question whether the conclusion of the court below would have been the same.

It is significant that nowhere in Respondents' brief is there any attempt made to show why an order of the Board claimed to be enforcible by administrative action is not subject to judicial scrutiny and review, nor is there any denial in Respondents' brief that the Board and the chief law officers of the Government assert the enforcibility of Board orders by administrative action—by plant seizure, by the imposition of sanctions under Executive Order 9370, or in any other manner deemed desirable. The question which Respondents say is involved in the proceeding below and in this court is a mere abstraction. It is a straw man which Respondents have set up solely for the purpose of being knocked down.

As Petitioner has endeavored to state in its petition for certiorari and supporting brief, it is not at this moment a question of how these grave questions should be decided. It is rather as to whether Petitioner should be denied its day in court for a determination of those questions and to have appropriate preventive relief if those questions are decided in its favor.

The plain fact of the matter is that the court below decided a false issue. The real issues should be passed upon by the courts below and ultimately by this court.

Petitioner therefore renews its prayer that certiorari be granted.

Respectfully submitted,

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APPENDIX.

ADVANCE RELEASE
Kelly—76961 OWI-4058

OFFICE OF ECONOMIC STABILIZATION

ADVANCE RELEASE:
For Thursday Morning Papers
February 15, 1945

Cleared and Released
Through Facilities of the
Office of War Information

The Office of Economic Stabilization today made the following statement:

The Director of Economic Stabilization, Fred M. Vinson, today announced that he had directed the cancellation of the war contracts of, and priority assistance to, E. A. Laboratories, Inc., of Brooklyn, New York. This action was taken pursuant to Executive Order No. 9370.

The National War Labor Board reported to the Director of Economic Stabilization that the E. A. Laboratories, Inc. had refused to comply with a directive order of the board. (The nature of the Board's order and the reasoning of majority and minority members of the board have already been presented in WLB press release numbered B-1830A for release on January 23, 1945.)

After this non-compliance case was called to the attention of the Office of Economic Stabilization, this office obtained reports on the nature and importance of the company's products from the War Department, the Navy Department, and the War Production Board. Acting upon this information and exercising his responsibilities under Executive Order No. 9370, the Director ordered the cancellation of contracts and priorities.

Executive Order No. 9370 reads, in part:

> AUTHORIZING THE ECONOMIC STABILIZATION DIRECTOR TO TAKE CERTAIN ACTION IN CONNECTION WITH THE ENFORCEMENT OF DIRECTIVES OF THE NATIONAL WAR LABOR BOARD
>
> "In order to effectuate compliance with directive orders of the National War Labor Board in cases in which the Board reports to the Director of Economic Stabilization that its orders have not been complied with, the Director is authorized and directed, in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary:
>
> "(a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a noncomplying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until the National War Labor Board has reported that compliance has been effectuated; * * *."

The Director of Economic Stabilization on January 31, 1945, addressed letters to the War Department, Navy Department and the War Production Board. The first four paragraphs, identical in all of the letters, follow:

> "The National War Labor Board, pursuant to Executive Order No. 9370, has referred to this office the case of E. A. Laboratories, Inc., in which the employer has persistently refused to comply with the Board's Directive Order (E. A. Laboratories, Inc., Case No. 111-11443-D).
>
> "The refusal of this employer to comply with a directive order of the National War Labor Board is detrimental to the government's wartime labor relations program. The orderly settlement of labor disputes is an integral part of the war effort.
>
> "I hereby find that the effects of this employer's refusal to comply with the Board's Directive Order threaten to delay and impede the effective prosecution of the war.

"I am informed by the War Department with respect to this employer 'that its production for the War Department could be absorbed by other firms if necessary. It follows, therefore, that any action which you might take under Executive Order No. 9370, including the denial of materials or services to this company or an order to the War Department to cancel contracts with the company, would not adversely affect any War Department supply program.' I am also informed by the Navy Department that 'cancellation of the company's contracts would not appear to interfere unduly with the war effort.' "

The Army and Navy letters continued:

"Under such circumstances, continued contractual relations between government procurement agencies and this employer would tend to impede rather than to promote the effective prosecution of the war and to defeat rather than to serve the public interest.

"Therefore, pursuant to Executive Order No. 9370, I hereby direct the Navy Department/War Department, unless the National War Labor Board shall report to it on or before February 10, 1945, that this employer is in compliance with the Board's Directive Order, to cancel or cause to be cancelled, all contracts of this employer as rapidly as possible."

The War Production Board letter continued:

"Under these circumstances, I find that the allocation to this employer of materials in short supply, or the extension of priority assistance to this employer would delay and impede rather than promote the effective prosecution of the war; and would be contrary to the requirements of the national defense and the public interest.

"Therefore, pursuant to Executive Order No. 9370, I hereby direct the War Production Board, unless the National War Labor Board shall report to it on or before February 10, 1945, that this employer is in compliance with the Board's Directive Order, to deny this employer all applications for priority assistance or for

the allocation of materials which are in short supply, and to cancel all outstanding priorities and allocations."

The courts have frequently decided that no individual or corporation has a legal right to a government contract; and certainly no employer who defies the Government's machinery for the settlement of labor disputes can claim such a legal right.

Likewise, with respect to materials and facilities in short supply, the Second War Powers Act provides that the President, or those to whom he delegates this authority "may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." In Executive Order No. 9370, the President has determined that the allocation of critical materials or facilities to those who refuse to abide by the legally authorized determinations of the National War Labor Board is not "necessary or appropriate in the public interest and to promote the national defense."

Action is not taken under Executive Order No. 9370 if it will unduly impede the war effort. That principle—the protection of the war effort—has been the keystone around which the government has carried on its efforts to secure compliance with National War Labor Orders.

Every defiance of an order of the National War Labor Board is a threat to war production. Every case of noncompliance disrupts the wartime machinery for the orderly settlement of labor disputes. Every time that orderly process is disrupted there is a loss in the effectiveness of the underlying pledge given by management and labor—that there will be no lockouts and no strikes. If one of the disputing parties has waited patiently through the attempts at conciliation, through the certification of the dispute to the

board, through the collection of data and the presenting of evidence, through the hearings and filing of briefs, through the appeal and consideration of the board, and then the decision of that board is not respected by the other party, he can well ask where did all of my patience and effort lead? And others can ask, why utilize that machinery? After a procedure such as this, and after it has become apparent that one of the parties will not comply, the Government must begin to consider measures to obtain compliance.

Persuasion accomplishes compliance in a remarkable number of cases. But with celebrated instances of defiance, it has been less successful of late.

If an actual interruption occurs, or a threat to interruption in production becomes imminent in a plant highly important to the war effort, the usual course has been Government possession and operation under the Smith-Connally Act and under the constitutional powers of the Commander-in-Chief.

Government possession and operation is not always the answer. The Government is reluctant to seize. But it is inexcusable not to exercise all of our powers to prevent the war machine from coming to a halt. Government possession and operation, however, can be the answer in only a few cases. The Government cannot run numerous plants. In some respects the seizure method is easy; it can be quick; it bypasses painstaking work in trying to figure out some other means of securing compliance, but so far it has not and it must not become an opiate for all of our non-compliance troubles.

The other weapon in our arsenal at present is Executive Order No. 9370. We also have hesitated to use it freely. Sometimes, at least from the financial viewpoint, it is much more severe than seizure.